No. 33.

Notice, Motion re. Recall

mandate re.

Office Supreme Court U. S.
FILED
JAN 2 1901
JAMES H. McKENNEY,
Clerk

Filed Jan. 2, 1901

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 33

EMILIE SAXLEHNER,

Petitioner,

vs.

ALEXANDER NIELSEN.

Notice of Motion, Motion and Petition to Recall Mandate and Amend Decree.

ANTONIO KNAUTH,
ARTHUR v. BRIESEN,
JOHN G. JOHNSON,
Attorneys and of Counsel for Petitioner.

The Evening Post Job Printing House, New York.

Supreme Court of the United States.

1

EMILIE SAXLEHNER, Petitioner, vs. ALEXANDER NIELSEN.	October Term, 1900. No. 33.

Notice of Motion.

2

TO ALEXANDER NIELSEN, THE ABOVE NAMED DEFENDANT:

Please take notice that on Monday, January 7, 1901, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, a motion to recall the mandate herein and to make the decree of the Supreme Court of the United States entered herein on October 15, 1900, more definite and certain, of which motion a copy is annexed, will be submitted to said Supreme Court of the United States at the City of Washington, D. C., for the decision of the Court thereon.

3

In support of said motion a petition and a brief will also be presented to the Court. A copy of the petition is herewith served upon you.

New York, December 21, 1900.

Respectfully,

ANTONIO KNAUTH,
ARTHUR v. BRIESEN and
JOHN G. JOHNSON,
Advocates and of Counsel for Petitioner.

4 Due service of the foregoing notice of motion and of the annexed motion and petition is hereby admitted this day of December, 1900.

Defendant.

By

his Attorney and Counsel.

SUPREME COURT OF THE UNITED STATES.

5

EMILIE SAXLEHNER, Petitioner, vs. ALEXANDER NIELSEN.	October Term, 1900. No. 33.

Motion.

And now comes Emilie Saxlehner, the above named petitioner, by Antonio Knauth, Arthur v. Briesen and John G. Johnson, her advocates and
6 counsel, and moves this Honorable Court to recall its mandate issued herein on the 20th day of November, 1900, to the Circuit Court of the United States for the Eastern District of New York, for the purpose of amending the same and to make its decree entered herein on the 15th day of October, 1900, more definite and certain concerning the relief to be granted to the complainant.

The matter involved herein relates to the protection of the petitioner in the exclusive use of her peculiar shape of bottle, label and capsule, used for her "Hunyadi Janos" Bitter Water, and each one thereof, and the question to be determined arises

from the doubt of the Judge of the Circuit Court, who entered the decree of July 19, 1898, as to whether the direction contained in the last paragraph of said decree of the Supreme Court was meant to deny to the complainant the relief by injunction separately claimed in her bill of complaint upon her bottle, capsule and label, and each one thereof, and confine it to relief upon the label.

Dated December 21, 1900.

EMILIE SAXLEHNER,
Petitioner.

By ANTONIO KNAUTH,
ARTHUR v. BRIESEN and
JOHN G. JOHNSON,
Her Advocates and Counsel.

SUPREME COURT OF THE UNITED STATES.

EMILIE SAXLEHNER, Petitioner, vs. ALEXANDER NIELSEN.	October Term, 1900. No. 33.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Emilie Saxlehner, respectfully shows to this Court:

FIRST.—That on the 20th day of November, 1900, a mandate issued out of this Honorable Court to the Circuit Court of the United States for the Eastern District of New York, which recited a decree of this Court entered herein on October 15, 1900, and was in words as follows:

10 UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE HONORABLE THE JUDGES OF THE [SEAL.] CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK, GREETING:

WHEREAS, lately in the United States Circuit Court of Appeals for the Second Circuit, in a cause between Emilie Saxlehner, appellant, and Alexander Nielsen, appellee, and Alexander Nielsen, appellant, and Emilie Saxlehner, appellee, on appeal and cross-appeal, wherein the decree of the said Circuit Court of Appeals entered in said cause on the 24th
11 day of January, A. D. 1899, is in the following words, viz:

"This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed, that the decree of said Circuit Court be and it hereby is reversed as to the red and blue labels and remitted with instructions to dismiss the bill, with costs of this appeal.

It is further ordered, that a mandate issue to the said Circuit Court in accordance with this decree.

W. J. W.,
12 E. H. L."

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals, which was brought into the Supreme Court of the United States by virtue of a writ of *certiorari* agreeably to the act of Congress in such case made and provided, fully and at large appears.

AND WHEREAS, in the present Term of October, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered, 13
adjudged and decreed, by this Court that the decree of the said United States Circuit Court of Appeals in this cause be, and the same is hereby reversed with costs; and that the said Emilie Saxlehner recover against the said Alexander Nielsen three hundred and fifty-three dollars and fifteen cents for her costs herein expended and have execution therefor.

And it is further ordered, that this cause be, and the same is hereby remanded to the Circuit Court of the United States for the Eastern District of New York with directions to reinstate its decree of July 18, 1898, and for further proceedings consonant with the opinion of this Court.

October 15, 1900. 14

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said writ of *certiorari* notwithstanding.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 20th day of November, in the year of our Lord one thousand nine hundred.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States. 15

COSTS OF SAXLEHNER.

Clerk	$148 40
Printing Record	184 75
Attorney	20 00
	$353 15

SECOND.—That said mandate was filed in the said Circuit Court on November 26, 190

THIRD.—That the bill of complaint in this case was of a similar character as that filed in the suit of

this complainant made against the Eisner & Mendelson Company in the Circuit Court of the United States for the Southern District of New York, and was argued and decided in and by the same Court and upon the same principles as established in said other case. That in said case against the Eisner & Mendelson Company the Circuit Court reached the conclusion that by addition of a "Seal Brand Label" the defendant in that case sufficiently avoided the charge of infringement, for which reason the claim of the bill of complaint for an injunction upon the bottle and capsule could not be successfully insisted upon. That thereafter, upon appeal to the Circuit Court of Appeals, both cases were dismissed by the Circuit Court of Appeals for the Second Circuit upon the same grounds in each case, and finally both cases were decided by the Supreme Court of the United States at the same time, and a decree made and mandate issued, as hereinbefore stated.

That on December 10, 1900, your petitioner, the complainant, presented to Honorable Nathaniel Shipman, a Judge of said Circuit Court, a proposed decree, injunction and accounting in said case against the Eisner & Mendelson Company, in which she prayed for injunctive relief upon her style of bottle, the same being of straight shape with a short neck, in connection with the sale of defendant's Bitter Water and also for an injunction against the use of any imitation of her label. That the Judge to whom said decree was presented entertained a doubt whether it was the intention of this Honorable Court by its opinion filed October 15, 1900, to grant to the complainant the relief for injunction prayed in her bill of complaint upon her peculiar shape of bottle, the design of her capsule and label and each one thereof, in accordance with the facts found and stated in the opinion of this Court, or whether the directions contained in the last paragraph of said opinion in the case against the Eisner & Mendelson Company were meant to confine said injunction to the label only,

in accordance with the terms of the decree of the 19
Circuit Court of April 29, 1898, and certified such doubt in a statement, a copy of which is hereto annexed marked Exhibit A.

FOURTH.—That the same question arises in this case, and your petitioner, unless she will be able to suppress the use of the capsule and peculiar shape of bottle adopted by the defendant in intended simulation of her style of bottles and capsules for her "Hunyadi Janos" Water, will be without remedy to prevent a continuation of the infringement upon her rights established by the findings of this Court and sustained in its opinion herein.

Wherefore, your petitioner prays for an order that 20
the said mandate be recalled and that the decree of this Court entered in this cause on October 15, 1900, be made more definite and certain, so as to remove the doubt aforesaid and grant to petitioner a decree of injunction for imitation of her label, capsule and shape of bottle, and each one thereof, as prayed in her bill of complaint, and that your petitioner have such further or other relief as may be deemed proper and in the interest of justice.

And your petitioner will ever pray, &c.

EMILIE SAXLEHNER,
By ANTONIO KNAUTH.

ARTHUR V. BRIESEN and 21
JOHN G. JOHNSON,
Her Advocates and Counsel.

22

Exhibit A.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EMILIE SAXLEHNER,
Complainant,

vs.

EISNER & MENDELSON COMPANY,
23 Defendant.

SAME

vs.

SIEGEL-COOPER COMPANY.

SAME

vs.

24 RUDOLPH GIES.

SAME

vs.

LOUIS MARQUET.

Proposed decrees for injunction and accounting having been presented to me by counsel for the complainant and the defendants in supposed accordance

with the decrees of the Supreme Court of the United States herein, dated October 15, 1900, and the several mandates issued thereon to this Court, I certify that I entertain doubt on the question whether said Supreme Court intended to grant to the complainant the relief upon the shape of the bottle prayed in her several bills of complaint herein apart from the label, or intended to confine the relief to the label, whether used with or without the bottle, and that for this reason I have declined to sign any decree herein until such doubt will be removed by appropriate proceedings in the United States Supreme Court. 25

Dated December 17, 1900.

N. SHIPMAN, 26
Circuit Judge.